

## Pensions in Dispute

August 2020

Welcome to our quarterly pensions litigation briefing, designed to help pensions managers identify key risks in scheme administration, and trustees update their knowledge and understanding. This briefing highlights recent Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact [pensions.team@allenoverly.com](mailto:pensions.team@allenoverly.com).

### GMP reconciliation: complaint about payment of CEP not upheld

As part of GMP reconciliation exercises, many schemes have paid contributions equivalent premiums (CEP) to HMRC in respect of members who had received a refund of contributions years earlier. The Pensions Ombudsman (TPO) has recently rejected a [complaint](#) by a former member who had left a scheme in 1983 and received a refund of contributions – it was not clear whether the CEP had been paid at that time, and in 2017 the trustee had made a CEP payment to cover the individual, as part of its GMP reconciliation exercise. The former member complained that he had been financially disadvantaged and that the 2017 payment was made without his consent. TPO was satisfied that the trustee had no GMP liability and did not uphold the complaint.

#### What does this ruling mean for trustees?

The trustee had explained the legislation and scheme rules as part of the IDR process, but the complainant felt that he was worse off than he would have been if he had received a GMP from the scheme, and pursued the complaint to TPO. This is a helpful decision for trustees and administrators, particularly where CEPs have been paid in similar circumstances.

### HMRC records used to establish scheme liability

Where a member transferred out many years ago, it is common for schemes to hold only limited records. [Last quarter](#) we reported on a decision in which HMRC records were a factor in TPO concluding that a transfer out had not been completed (and the original scheme retained liability for paying the benefits). In a [recent decision](#), the Deputy Pensions Ombudsman (DPO) relied on HMRC records to find that a receiving scheme (which had no record of the transfer in) was liable.

In this case, the member complained that he was entitled to a deferred pension in Scheme A (that the trustees were improperly refusing to pay) OR that if his Scheme A benefits had been transferred to Scheme B, that Scheme B had not included these transferred-in benefits when calculating and paying a transfer out in 1995. Scheme A had no record of his membership and concluded that he had transferred out. Scheme B said that it had no record of a transfer in from Scheme A (and that the 1995 transfer did not include an allowance for any benefits supposedly transferred in). HMRC's GMP records stated that liability had been transferred to Scheme B.

Mr N's complaint against Scheme B was upheld: on the balance of probabilities, the Scheme A benefits had been transferred into the scheme (but had not been included in the subsequent transfer out). DPO noted that she could not disregard the clear evidence from the HMRC records (and DPO had in fact contacted HMRC as part of the investigation to determine who was now responsible for paying the GMP accrued in Scheme A). Scheme B was directed to reconstruct the transfer in and calculate the deferred pension (if Mr N elected to receive a backdated retirement pension and lump sum, simple interest was payable on the payments due).

#### What does this ruling mean for trustees?

Given the passage of time, the existence of only limited records is unsurprising. Here, Scheme A held no records and while Scheme B had no correspondence or records indicating the transfer in, it could not refute the evidence of forms that HMRC had received.

Although GMP reconciliation exercises have demonstrated that HMRC records are not always correct, those records may be given significant weight (or be determinative) in cases where they cannot be positively shown to be incorrect.

## Lifestyling: complaint about insufficient information not upheld

TPO has recently rejected a [complaint](#) by a member that he had been given insufficient information about the significance of his ‘target retirement date’ (TRD) and lifestyling. The member argued that if he had been given more information, he might have selected a different TRD and/or investment strategy rather than remaining in the default fund. He also complained that the trustee had refused to provide details of his hypothetical alternative fund value (based on a different TRD/investment profile) so that he could identify whether he had been disadvantaged by lifestyling. The trustee had provided relevant information in various ways, including via the plan booklet, in annual benefit statements and letters and on the scheme website.

TPO concluded that the information provided by the trustee was adequate and clearly explained TRDs and lifestyling – the member could have sought further advice or guidance in order to make an informed choice. TPO agreed with the trustee that its duties and responsibilities did not include informing the member of what the value of his fund would be if he had made different investment decisions.

### What does this ruling mean for trustees?

TPO was satisfied that the trustee had clearly explained how TRDs and lifestyling operated; it was for the member to seek further advice if he wished. TPO noted that, although comparison tools are helpful for members to test different scenarios, they are not a requirement and there is no general duty to provide information or advice to prevent economic loss.

### Watch this space

- We are expecting a further judgment on GMP equalisation in the *Lloyds* case (on transfers-out).
- The government is [consulting](#) on proposals for changes to public sector pensions following the *McCloud/Sargeant* litigation.
- Changes to TPO’s processes are [expected](#) following a government consultation (although there has been no progress for some time).

### Equalisation: Safeway update

The Court of Appeal has handed down a further decision in the *Safeway v Newton* equalisation dispute, finding that the introduction of the equal treatment rule in section 62 of the Pensions Act 1995 closed the *Barber* window from 1 January 1996. You can read more about the litigation [here](#).

The decision will be of interest to schemes that sought to retrospectively equalise retirement ages between 1 January 1996 and 6 April 1997 (when section 67 of the Pensions Act 1995 came into force, preventing certain retrospective amendments).

### Contact us



**Jason Shaw**  
Counsel – London

**Contact**  
Tel +44 20 3088 2241  
Mob +44 7823 530 809  
[jason.shaw@allenovery.com](mailto:jason.shaw@allenovery.com)

Jason is a Counsel in the Litigation group. He specialises in all aspects of pensions disputes, including advising clients in relation to internal disputes and disputes before the Pensions Ombudsman, the Financial Ombudsman Service, the Pensions Regulator, the PPF Ombudsman and the Courts. The Chambers & Partners Directory includes quotes from clients, stating that Jason is ‘brilliant’, ‘unflappable, easy-going and very hard-working’ and has ‘really good market insight and technical knowledge’.



Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales.

The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP’s affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2020. This document is for general guidance only and does not constitute definitive advice. | CO:2002083529.2